hinges of the knee—to worship the "superior commercial skill" which in the former day was known as felony—to join in the loud acclaim, "Great is Diana of the Ephesians," and to utter again the most brutal mob-taunt of all the centuries, adapted to the American people, "They saved others: themselves they cannot save."

GEORGE BRYAN.

WHEN THE OWNER OR EMPLOYER IS LIABLE FOR THE NEGLIGENT ACT OF THE INDEPENDENT CONTRACTOR.

The only decision in Virginia touching this doctrine is that of *Bibb's Administrator v. N. & W. R. R. Co.*, 87 Va. 711. This case, in a long and labored opinion, was correctly decided, but not without a drastic criticism of a noted English jurist as well as of some American opinions, disapproving two of the leading cases on the subject—*Hole v. S. S. R. R. Co.*, an English case; and *City of Chicago v. Robbins*, decided by the Supreme Court of the United States, 2 Black, 418. Nevertheless the principles and reason of the two opinions seem to have been largely influential in determining the principal case, the result being different because the law, facts, and circumstances were such as to demand a different conclusion.

It is not, however, the intention of the writer to criticise particularly Bibb's case, but as all lawyers are interested in knowing what the law is, as well as what it ought to be, it is herein sought to try to briefly deduce from some of the decided cases the rules and conditions under which, when found to exist, liability will attach to the owner, after he has turned over the work to an independent contractor, who may accomplish it in his own way and methods.

In the outset it may be well to state that practically all the authorities agree that the owner incurs no risk of liability from the fact that he reserves the right to keep cognizance of the progress of the work, to the end that a given result shall be reached in accordance with the contract entered into; provided he does not reserve the right to direct or control the contractor, or his employees, in the manner of doing the work; the contractor must bring about the end sought in obedience to his own will, skill and methods. A familiar illustration is that of the

almost daily practice, especially in the larger cities, of owners who let the contract to a builder, to build a certain structure; A, the builder, sublets the brickwork to B, the carpenter's work to C, the plumbing to P, &c. Now, when the owner entrusts the entire job to A his responsibility ceases, and he incurs no liability for the negligence of any of the four, or their employees. This is the general rule, based upon the principle that the owner does not sustain the relation of *master* to any of the others mentioned; and further, the work to be done is not, (1) A *nuisance in itself, and does not necessarily result in a nuisance;* and, (2) *The work is not necessarily dangerous per se;* and, (3) *Is not a duty imposed by contract;* and, (4) *Is not a duty imposed by law;* and, (5) *Is not a work unlawful in itself;* and, (6) *The owner has not knowingly selected an incompetent contractor.*

None of these six circumstances existing, the owner is free from liability. In criticising the English case above referred to, the Court in Bibb's case says: "The language used by Pollock, C. B. in *Hole v. S. S. R. R. Co.* involves a manifest absurdity," p. 738. This statement was made by the Court in Bibb's case because Pollock, C. B., in a previous decision (where, however, *no legal obligation rested upon the defendant*) said: "If a person gives an order to a tradesman to do some work he means him to do it in the ordinary way, and the employer has a right to presume that he will do it in that way, he cannot be held chargeable, because he did not personally see to it that the work was done."—*Butler v. Hunter*, 7 H. & N. 826.

Whilst in *Hole v. S. S. R. R. Co.* the same Pollock, C. B., says: "It was the duty of the Company (the defendants) to see *how* the contractor was about to construct the bridge." The case of *Hole v. S. S. R. R. Co.* was briefly this: The Company was empowered by act of Parliament to build a bridge across a navigable stream. The Act provided that it should not be lawful to detain any vessel navigating the stream for a longer time than was necessary to enable those crossing on the bridge to pass over, when it should be opened to admit the vessel. The R. R. Co. employed a contractor to build the bridge in conformity with the Act, but before its completion, from some defect in its construction, the bridge could not be opened and a vessel was prevented from navigating the river. *Held:* The R. R. Company was liable. *Hole v. S. S. R. R. Co.*, 6 Hurl. N. 488. This was manifestly a correct decision, because there was a *duty imposed by law*, the very Act permitting the erection of the bridge imposed the legal obligation upon the owner to keep the stream open for vessels, and therefore the

owner could not rid himself of that duty by letting the job to contract; and these two cases sustain both the general principle above stated and the fourth limitation respectively. There is another case: *City of Chicago v. Robbins*, 2 Black, 418. Although disapproved in the Bibb case, yet it illustrates the first limitation to the doctrine. In this case the court says: "A hole cannot be dug in the sidewalk of a large city and left without guards, and lights at night, without great danger to life and limb, and he who orders it to be dug and makes no provision for its safety is chargeable. If the nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or the owner is liable."—*Ibid.*

The third (3) limitation is completely illustrated by the case of *Water Co. v. Ware*, 16 Wall. 566. It will suffice to state the syllabus: "Where an incorporated Company undertook to lay water pipes in a city, agreeing that it would 'protect all persons against damage by reason of excavation made by them in laying pipes, and to be responsible for all damages which may occur by reason of the neglect of their employees on the premises.'" *Held:* "On the Company's having let the work out to a sub-contractor, through the negligence of whose servants injury occurred to a person passing over the street, that the Company could be properly sued for damages."

So, an obligation *by contract* cannot be escaped.

The (2) second limitation, where the work is dangerous *per se, i. e.*, where a prudent man can foresee such dangers, necessarily incident to the work, he must provide against them. 1 Lawson, sec. 296; Wood's Master and Servant, 592, 631; Addison on Torts, sec. 106.

The (5) fifth limitation where the work "*is unlawful in itself,*" as where "one employs a contractor to enter upon land and do certain work, and it turns out that the entry was a trespass, the employer is liable," needs neither argument nor authority. *Congreve v. Morgan*, 5 Duer, 495, however, illustrates this limitation.

The (6) sixth limitation seems to be sustained by 1 Lawson, sec. 300, and Thompson on Negligence, 908, and is probably a proper one; and if so, does it not therefore follow that prudential care should be exercised by the employer, when he sets about to let his contract to the independent contractor, to select a careful and competent person? If, then, a seventh limitation is to obtain, is not the doctrine about "limited" out of existence? And are we not, simply by the process of elimination, brought to the common doctrine of master and servant?

Notwithstanding the general rule, as stated in the beginning, is based upon the idea that the relation of master and servant does not exist.

The writer has not found any case directly deciding the point, but in Bibb's case we find this significant language: "It can but be obvious to every impartial mind that when any person . . . . has, in the exercise of due care and caution, selected a competent and skillful contractor, &c."

Whilst this is an *obiter*, yet the fact was noticed, and seems to have been in the mind of the court, that there was "no lack of such care and caution."

But if the owner, under the general rule, is exempt from liability for the negligence of this contractor, and none of the other six circumstances above mentioned exist, upon what principle of responsibility or existing relationship can an injured party complain that the owner was not prudent in his selection of an independent responsible will to accomplish a given work? Is it not presumed that the owner would engage and had engaged a reasonably careful and competent contractor in the outset?

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East Radford, Va., Jan. 27, 1897.

TESTIMONY OF A DECEASED WITNESS IN CRIMINAL CASES.

There is no question as to the rule that in a civil action testimony is admissible to show what a witness, since deceased, stated on a previous trial between the same parties and on the same issue.

It was formerly held, and is, perhaps, still the rule in England, based upon a *dictum* of Lord Kenyon, that the whole of the deceased witness' testimony must be given in his precise words; but now in the United States the almost universal rule is that it is sufficient to give the substance of what the witness stated. *Caton v. Lenox*, 5 Rand. 36.

It was also formerly held that such testimony was only admissible in case of the death of the witness; but now the rule is not so strict, and such evidence is usually admitted where the witness is beyond the jurisdiction of the court, has become insane, cannot be found, or has been removed by the procurement of the other party, though there is great conflict on this point.